

Environmental and Natural Resource Litigation Status
Dept. of Fish, Wildlife and Parks (DFWP) and the
Fish, Wildlife and Parks Commission (Commission)
March 19 and 20th, 2014

State District Court cases:

Citizens for Balanced Use, et al. v. Maurier, Montana Seventeenth Judicial District, Blaine County, Cause No. DV-2012-1.

Plaintiffs challenged the “wild bison” status of quarantined bison out of Yellowstone National Park (YNP). The basis for their claim is found solely in the dicta language of the Montana Supreme Court decision issued in this case on another issue (see description below under Supreme Court Cases heading). The Department argued in its district court brief that Plaintiff’s claims are invalid for the following reasons: the language in the Supreme Court’s decision was incorrect and does not hold precedent in law, Plaintiffs failed to plead this matter in their original complaint and arguments, and the statute is clear that these are “wild bison.” The matter is fully briefed before the state district court in Blaine County. The Department awaits a decision on this matter.

Western Watershed et al. v. DFWP, 18th Judicial District Ct., Gallatin County, Cause No DV-10-317A.

Plaintiffs allege that DFWP breached its duty under the Montana Constitution’s “clean and healthful environment” provision as well as the Public Trust Doctrine when it exchanged 75% of the newborn bison crop for caring for the quarantined disease free bison DFWP initially acquired from YNP. The district court heard the case on a summary judgment motion and ruled in favor of the Department.

Department of Fish, Wildlife & Parks v. Troy Wanken & Wanken Farms, 19th Judicial District, Toole County, DV-12-015.

The Department filed a Declaratory Judgment action to establish the right and scope of the administrative and public access to the Marias River Wildlife Management Area along the Lincoln Road. Case is at the Summary Judgment briefing stage. The Department continues to attempt resolution to this matter. Trial is set for May 13, 2014 in Shelby. The trial is scheduled to begin May 13.

Helena Hunters and Anglers (HHA) v. Maurier, MFWP, First Judicial District, Lewis & Clark County, BDV-2012-868.

Plaintiffs filed suit against the Department alleging that it violated statutory provisions to prevent species from being listed on the Endangered Species Act list. In addition, Plaintiffs argued that the Department failed to consider a Petition for rulemaking it submitted in 2012 to prohibit wolverines from being trapped while the U.S. Fish and Wildlife Service made its decision whether to place wolverine on the ESA list. This case is on its third stay, pending the listing decision of FWS, which should be determined by this summer.

Paulson v. Monsanto and DFWP, 10th Judicial District Court, Fergus County, Cause No. DV-2004-08.

DFWP, in the 60s and 70s painted Big Springs Trout Hatchery raceway walls and floors with PCB-laden paint which eventually contaminated the hatchery as well as the Big Springs Creek with PCBs. DFWP was sued in 2004 by riparian landowners downstream for personal injuries in the first phase of the lawsuit. DFWP settled with the landowners for \$700,000. Monsanto, the manufacturer of the paint, settled with the landowners as well. In the second phase of this lawsuit a settlement was made in DFWPs favor for \$5,000,000 with Monsanto in the cross claim made by DFWP for the contamination of raceway paint used at the Big Springs Trout hatchery with PCBs. DFWP demolished the hatchery and rebuilt a new one and is remediating Big Springs Creek under the supervision of the EPA.

Taleff and Walsh v. DFWP, 8th Judicial District Ct., Cascade Cty., Cause No. DDV-060533.

DFWP was gifted 10 acres on Lake Five for a fishing access site (FAS) by a woman in memory of her son. A group of landowners around Lake Five sued DFWP in 2006 over the claimed failure of DFWP to involve the public in its decision to acquire and develop the FAS on Lake Five. District Court Judge Sandefur issued a preliminary injunction prohibiting the development of the Lake Five FAS pending the outcome of the litigation. In a settlement agreement, DFWP agreed to redo the decision process with proper public involvement. After an independent consultant prepared an EA considering all potential sites, DFWP made a determination to develop the existing site and the adjoining landowners appealed the decision to the Director alleging that DFWP did not comply with the Good Neighbor Law among other things. A settlement was agreed to with the landowners and a Fishing Access Site was built with everyone's agreement.

McGinnis Meadows Cattle & Guest Ranch LLC v. MFW; and Joe Maurier, its Director, 11th Judicial District, Flathead County, Cause No. DV-12-261D.

Plaintiff landowner filed suit in February 2012 against FWP alleging it failed to attach a radio-tracking collar to at least one wolf in each wolf pack near livestock as required by Mont. Code Ann. § 87-5-132(1), and associated administrative rules. FWP has actively attempted to track and attach radio tracking collars on wolves in active wolf packs but the elusive nature of wolves make it difficult. Plaintiff served first discovery requests shortly thereafter but has not prosecuted the case since. The Court has not issued a scheduling order.

Carver v. DFWP and Flathead County, 11th Judicial District, Flathead County, Cause No. DV-10-667(B).

DFWP was sued by Plaintiffs Carver who donated land to Flathead County for public access on a Flathead River slough called Church Slough. Carver sued the County alleging that it violated an agreement to limit public access to walk-in access when it built a boat ramp on the site. Carver sued FWP alleging that it violated MEPA by not drafting an adequate environmental assessment before issuing a 124 permit to the County for building the boat ramp. The case has been submitted to the court on a motion for judgment on the pleadings by FWP and is progressing through the scheduling order

Case against Flathead County went to trial. County has prevailed on all counts. Case against FWP was decided on summary judgment. FWP prevailed on one count. Case was remanded to FWP to conduct additional MEPA analysis. FWP released supplemental EA and decision notice (July, 2013). Plaintiff did not challenge sufficiency of supplemental EA. Boat ramp is open and was used by public through the remainder of 2013 boating season.

Montana Supreme Court cases:

Park County Stockgrowers Ass'n vs. MDOL and MDFWP, et al.

Park County vs. State of Mont., FWP and DOL; 6th Judicial District, Park County, Cause Nos. DV-11-77 and DV-11-78.

Park County Stockgrowers and Park County, in 2011, filed separate suits against the DFWP, DOL, then Governor Schweitzer and Dr. Zalusky and against State of Montana, FWP, and DOL, respectively (collectively State Respondents). The suits were consolidated into one suit alleging that the State Respondents' decision and decision-making process to expand the boundary of bison tolerance from the 2000 Interagency Bison Management Plan (IBMP) failed to comply with statutory duties, violated individual rights to a clean and healthful environment, created a nuisance, and violated MEPA when FWP and DOL failed to conduct an additional

environmental analysis. The district court issued a decision in January of 2013 that upheld the State's decision and process. Park County alone, without the other Plaintiffs, filed an appeal with the Supreme Court and the appeal is currently pending.

Citizens for Balanced Use, et al. v. Maurier, Montana Supreme Court, Montana Supreme Court, DA 12-0306.

Plaintiffs filed suit challenging the Department's movement of disease-free bison to Fort Peck and Fort Belknap Indian Reservations because the Department did not develop a management plan contemplated by Mont. Code Ann. §87-1-216(4)-(6). The Department did not apply this statute to the placement of bison upon Indian country because the language of the statute required only that a management plan be developed when placing bison on "private or public lands in Montana." The district court ruled against the Department and issued a preliminary injunction requiring the Department develop a management plan. The Department appealed the decision to the Supreme Court.

The Supreme Court issued a decision that overturned the district court decision and upheld the Department's actions. The decision also indicated, in dicta, that there was a chance that these bison are not wildlife. Plaintiffs moved the district court to determine these quarantine bison not wildlife as a result. (See explanation of district court case above.)

Citizens for Balanced Use (CBU), v. Fish and Wildlife Commission, Montana Supreme Court, DA 14-0046.

The Plaintiffs filed a case in district court challenging the Fish and Wildlife Commission's (Commission) public notice and participation process as insufficient for its December 10, 2012 decision to close the wolf season in two small wolf management units outside Yellowstone National Park (YNP) near Gardiner. The Commission prevailed at the district court level because the case was moot. The fact that the 2013 legislature rendered it impossible for the situation to repeat because the Commission no longer had the authority to close units around YNP was the basis for the district court's decision. However, the district court awarded Plaintiffs attorneys fees and costs because they were able to get a preliminary injunction prior to the case becoming moot. We believe there is significant Supreme Court precedent indicating that this is not correct, and are appealing the attorney's fees issue to the Supreme Court. Opening briefs are due on March 24.

Buhmann and Wallace v. State of Montana and Sportsmen for I-143, Montana Wildlife Federation, Montana Supreme Court, Case No. 05-473.

District Court Judge McCarter ruled that I-143 (November 2000 game farm initiative) did not result in an uncompensated taking of Buhmann and Wallace's property. Both Buhmann and

Wallace appealed to the Montana Supreme Court. The Montana Supreme Court decided, on December 31, 2008, that I-143 was not a taking of private property that required compensation by the State of Montana. The plaintiff asked the United States Supreme Court to hear an appeal of the Montana decision. The U.S. Supreme Court decided not to take the appeal.

Kafka and Bridgewater v. DFWP and State of Montana, And sportsement for I-143, Montana Wildlife Federation, Montana Supreme Court, Case No. 05-146.

District court Judge Rice ruled the enactment and enforcement of I-143 (November 2000 game farm initiative) was not an uncompensated taking of Kafka and Bridgewater's property. Both Kafka and Bridgewater appealed to the Montana Supreme Court. As in the Buhmann case above, the Montana Supreme Court decided, on December 31, 2008, that I-143 was not a taking of private property that required compensation by the State of Montana. The plaintiff asked the U.S. Supreme Court to hear the appeal of the Montana decision. The U.S. Supreme Court decided not to hear the appeal.

Montana Shooting Sports Ass'n. v DFWP, Fourth Judicial District, Missoula County, Cause No. DV 09-0101.

DFWP is required by Title IV-D of the Social Security Act to collect the last four digits of the Social Security Numbers of all applications for fishing, hunting and trapping licenses. Plaintiffs brought suit alleging that the collection of said four digits is a violation of the Montana Constitutional right of privacy and heritage to hunt. After a 2 day trial the District Court ruled in favor of FWP holding that the Montana Constitutional provision on the right of privacy did not prohibit the collection of such numbers. The Supreme Court affirmed the District Court.

Federal District Court cases:

Friends of the Wild Swan v. Vermillion, US District Court for the District of Montana, Missoula Division, CV 13-66-M-DLC.

Plaintiffs filed suit in federal district court alleging that the Department is liable under the Endangered Species Act (ESA) for recreational trappers' incidental take of lynx. The Department's trapping programs have adequately prevented the incidental take of lynx under the law. In those instances of incidental take of lynx have in bobcat sets, the USFWS allows for an exemption under the ESA for a limited number of lynx caught pursuant to recreational bobcat trapping. This case is still in the discovery phase, with motions to dismiss due mid August. No trial date has been set.

Grizzly Bear Delisting Cases:

Plaintiff environmental organizations filed two separate but very similar lawsuits (one in Idaho Federal District Court and one in Montana Federal District Court) challenging the U.S. Fish and Wildlife Service's (USFWS) decision to remove the grizzly bear population in the Greater Yellowstone Area from the federal Endangered Species Act list of threatened species. The USFWS established the Greater Yellowstone Area grizzlies as a distinct population segment. A mandatory settlement conference failed to resolve the case.

Judge Molloy, Montana Federal District Court, ruled on September 21, 2009 that the delisting rule violated the Endangered Species Act because there were inadequate regulatory mechanisms for the Greater Yellowstone Area grizzly DPS if delisted and because the record did not support the USFWS's conclusion that declines in white bark pines would not harm grizzly bears. He did, however, hold the rule was valid regarding two other issues raised by the plaintiffs. He supported the conclusion that the genetic diversity and population size were sufficient for delisting and that the available habitat in the Greater Yellowstone Area was a significant portion of the range of the Greater Yellowstone Area grizzly DPS.

This adverse decision was appealed to the 9th Circuit by the federal defendants and the States of Montana and Idaho and the National Wildlife Federation. The lawsuit before the Idaho Federal District Court has been stayed pending the appeal to the 9th Circuit in the Montana case.

Grizzly Bear Delisting Case

The federal defendants, USFWS and U.S. Department of Interior, Montana, Idaho, National Wildlife Federation, and Safari Club International appealed the Montana Federal District Court's decision that vacated the delisting of the Greater Yellowstone Area grizzly DPS. Briefing has been completed and a hearing before the 9th Circuit was held on March 8, 2011. The case is submitted for a decision by the 9th Circuit.

The U.S. federal 9th Circuit Court ruled in favor of Plaintiff on one count and in favor of USFWS and Defendant Interveners on one count. The delisting rule was vacated and the grizzly bear continues to be listed as threatened under ESA. District Court in Idaho dismissed the Idaho case after ruling of 9th Circuit.

Administrative Contested Case Proceedings

DFWP is involved in several contested case proceedings before DNRC. Periodically, DFWP objects to new applications for water use and applications for change of water use that have the potential to adversely impact instream flow rights held by DFWP. DFWP typically is involved with about 10 DNRC contested case proceedings.